

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
JACK A. and SANDRA McQUEEN,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 81-18
FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the denial from the Department of Ecology of an application to appropriate surface water for the purpose of irrigation, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington (presiding) and David Akana, at Tacoma, Washington, on April 15, 1981. Appellants were represented by their attorney Carson F. Eller. Respondent was represented by Wick Dufford, Assistant Attorney General. Court reporter Lois Fairfield recorded the proceedings.

Having heard the testimony and having considered the exhibits and

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1 being fully advised, the Board makes the following

2 FINDINGS OF FACT

3 I

4 The appellants on November 9, 1979, made an application to the
5 Department of Ecology (DOE) to withdraw 0.13 cubic feet of water from
6 a small pond on an unnamed stream in Section 22, Township 21 North,
7 Range 1E, Kitsap County, for the purpose of irrigating up to 4 acres
8 of land. Mr. and Mrs. Gary Tennison, owners of adjoining property,
9 protested the application. The application was denied by DOE. It is
10 from this denial that appellants have appealed.

11 II

12 Appellants developed the small pond in a natural depression in a
13 low marshy area on their property by excavation and by the development
14 of a dike at the lower end of the marsh. The marsh and pond are fed
15 by the headwaters of a small, unnamed stream. Mr. and Mrs. Gary
16 Tennison, owners of adjoining property, with the cooperation and
17 assistance of appellants, enlarged the existing pond by excavating in
18 the low-lying marsh area on their property. The resulting pond is
19 more than double the size of the original pond, with more than half of
20 the enlarged pond being located on the property of the Tennisons, with
21 the remainder being on appellant's property.

22 III

23 The objective of the Tennisons in utilizing their property for
24 enlarging the pond was purely for scenic, aesthetic, and recreational
25 purposes, including fishing.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

1 IV

2 In the early part of the summer of 1979, appellants installed a
3 pump and began withdrawing water from the pond for the purpose of
4 irrigation. The diversion of water by appellants lowered the level of
5 the pond, greatly lessened the amount of flow downstream,
6 substantially reduced the depth and surface area of the pond, and left
7 aesthetically unappealing muddy areas exposed. All of these adverse
8 results of pumping affected not only that part of the pond located on
9 appellants' land but also that part of the pond located on the
10 property of the Tennisons.

11 V

12 Since appellant did not have a permit to withdraw surface water,
13 the Department of Ecology ordered appellants to cease pumping water
14 from the pond. Appellants complied with the order and filed their
15 application in an effort to comply with the surface water code
16 (chapter 90.03 RCW).

17 In its denial of the application, the DOE reasoned that the stream
18 carries very little water and that there is insufficient water
19 available in the stream-pond system during the irrigation season to
20 maintain a natural flow and at the same time, allow for out-of-stream
21 consumptive use.

22 VI

23 Two photographs introduced in evidence by respondents (R-4 and
24 R-5) and the testimony clearly show that there is insufficient water
25 in the stream-pond system during the irrigation season to maintain a
26 natural flow and at the same time allow for out-of-stream consumptive
27

1 use. Respondent's Exhibit 4 taken on April 21, 1979, shows an
2 aesthetically pleasing small body of water. Respondent's Exhibit 5
3 taken on October 4, 1979, shows the pond almost empty with large areas
4 of exposed, unattractive, muddy banks.

5 VII

6 Pumping water from the pond in the amount necessary to irrigate
7 appellant's land will lower the level of the pond below the level of
8 its outlet and will deprive the watercourse below the pond of most of
9 the water it would otherwise receive, thereby adversely affecting
10 aquatic and wildlife, downstream land owners, and the public
11 generally. The substantial reduction on the pond's aesthetic
12 qualities also is detrimental to the abutting land owners and to the
13 public.

14 VIII

15 Any Conclusion of Law which should be deemed a Finding of Fact is
16 hereby adopted as such.

17 From these Findings the Board comes to these

18 CONCLUSIONS OF LAW

19 I

20 The water in question is public water and is subject to the
21 provisions of RCW 90.03.010. Proctor v. Simms, 134 Wash 606 (1925).

22 II

23 The pond from which appellant seeks to appropriate water is a
24 natural waterbody which discharges into a natural water course. Its
25 character as a natural pond is not affected by the fact that it has
26 been deepened by artificial means. Rigney v. Tacoma Light and Water

1 Co. 9 Wash. 576 (1894).

2 III

3 RCW 90.03.290 provides in part that before an application for the
4 appropriation of surface water can be approved, it must be found by
5 DOE that: (1) there is water available for appropriation; (2) the
6 waters will be applied to a beneficial use; (3) the appropriation
7 thereof as proposed in the application will not impair existing
8 rights; and (4) the proposed appropriation will not be detrimental to
9 the public welfare.

10 RCW 90.54.020 states, in part, as follows:

11 Perennial rivers and streams of the state shall be
12 retained with base flows necessary to provide for
13 preservation of wild life, fish, scenic aesthetic
14 and other environmental values.....Lakes and ponds
shall be retained substantially in their natural
condition.

15 IV

16 The proposed use is beneficial. There is no evidence of an
17 existing appropriative right which may be adversely affected.
18 However, water would be available for appropriation only to the
19 detriment of existing nonconsumptive instream uses such as those
20 contemplated in RCW 90.54.020 and those which concern the Department
21 of Game. Accordingly, the granting of appellant's application to
22 withdraw water from the pond for irrigation would be detrimental to
23 the public welfare. Therefore, in accordance with the provisions of
24 RCW 90.03.290, the denial of appellant's application by the Department
25 of Ecology should be affirmed.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

V

Any Findings of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Order of the Department of Ecology denying appellant's application for the appropriation of surface water is affirmed.

DATED this 30th day of July, 1981.

POLLUTION CONTROL HEARINGS BOARD


NAT W. WASHINGTON, Chairman


DAVID AKANA, Member

(Did not participate)
GAYLE ROTHROCK, Member